United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

B
P/S

76-1282

In No. 76-

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-versus-

LOUIS OSTRER,

Defendant, Appellant
Applicant

Defendant-Appellant's
Petition for Rehearing
In Banc

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee,	:	No. 76-1282
-versus-	:	Defendant-Appellant's Petition for Rehearing En Banc
LOUIS OSTRER,	:	
Defendant, Appellant, Applicant.	:	

The Defendant-Appellant in the above-captioned and numbered proceeding hereby petitions this Honorable Court to rehear en banc the appeal herein, which appeal was decided adversely to Defendant-Appellant by a panel of this Court on October 28, 1976, only a couple of days after oral argument was held.

This case raises a recurring and important constitutional issue, in the context of a largely uncontested factual setting. The trial court found, inter alia, the following facts:

1. "On October 25, 1972, while Ostrer was awaiting trial under this indictment," New York City Police Officers assigned to the New York County District Attorney's Office conducted an electronic surveillance -- "using bugging and telephone wire-tapping orders" -- of Louis Ostrer's business premises. This surveillance continued throughout the trial preparation and

actual Federal trial of Ostrer (App. 678-679).*

2. "It has been stipulated for purposes of this motion [and, of course, this appeal] that this surveillance conducted by state law enforcement authorities was in violation of Ostrer's Fourth Amendment rights. [T]he constitutional invalidity of this eavesdropping is not in dispute..." (App. 702).

3. During the course of this unconstitutional surveillance, the District Attorney's office overheard repeated discussions concerning "the impending federal trial..." (App. 680). "Among the more significant topics discussed were, (1) whether Ostrer should seek a trial severance from his co-defendant John Dioguardi; (2) whether Ostrer should waive his right to a jury trial and testify in his own behalf; (3) the likely impact of Ostrer's testimony, considered in light of disclosure on cross-examination of his prior state felony conviction as impeachment; and (4) the tactical value of having Ostrer introduce certain cancelled checks. Also mentioned was the name of Ostrer's private investigator, one James Lynch, formerly of the Federal Bureau of Investigation. None of the conversations were with Maurice Edelbaum, Esq., then Ostrer's counsel of record in the federal case, but at times the conversations included discussion by others with Ostrer of Mr. Edelbaum's

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*The designation "App." refers to the Appendix to the brief filed in this Court, while "Ex." refers to the separately bound volume of evidence exhibits filed in this Court.

comments and advice."

4. During the course of the unconstitutional surveillance, the District Attorney's office overheard the giving of "legal counsel"* to Ostrer by one of his attorneys, Julius November.** This legal counsel related directly to the pending federal indictment and forthcoming federal trial and covered, inter alia, how to deal with a potential government witness at the trial (App. 682-683).

5. The Government has formally conceded on the record that the overheard conversations were such that "[h]ad all of the information which was intercepted over the wire been communicated to a Federal prosecutor, I would say there had been some unconstitutional interception of defense communications." The trial judge seemed to agree that a new trial would be required had all the intercepted information been communicated to the Federal prosecutor.***

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*"We are persuaded that during the course of pre-trial preparation, Ostrer reasonably believed that November was extending legal counsel, rather than friendly advice. The testimonial privilege against disclosure of attorney-client communication is applicable where the client entertains good faith belief (even if erroneous) that the person consulted is a lawyer, and is acting as such on his behalf." (App. 682; emphasis in original.)

**"We therefore conclude that, for purposes of this motion, November was acting as an attorney for Ostrer" (App. 682).

***"If everything which the D.A.'s policemen did record or could have recorded which occurred in Ostrer's office prior to verdict had been transmitted fully and immediately to [Assistant United States Attorney] McGuire, our view of this motion would be different" (App. 707).

6. The trial court made the following critical finding: "we have found [that Assistant District Attorney] Fine did transmit information to [Assistant United States Attorney] McGuire that he derived from the eavesdropping on Ostrer's conversations..." (App. 703). Moreover, the "information" that Fine transmitted to McGuire concededly was derived directly from "legal counsel" given by Ostrer's attorney, Julius November, to Ostrer concerning the strategy toward a prospective Government witness at the Federal trial (App. 694).

7. Finally, the Government concedes that "the thrust of the conversation" between Ostrer and his attorney discussing the legal strategy to be employed in dealing with a potential government witness was transmitted to the trial prosecutor in Ostrer's Federal case. (Government's brief on appeal at p. 45)

Accordingly, the record of this case contains uncontested facts giving rise to a classic Sixth Amendment intrusion into the lawyer-client communications involving a Federal criminal defendant.* All of the elements of such an intrusion have been conceded by the Government and found by the trial court. Yet the motion for a new trial was denied. The reasons given by the trial court for denying the new trial came down, in essence, to these: Although it is surely possible that Ostrer may have

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*The violation is, of course, not limited to the Sixth Amendment; the wiretap was also concededly in violation of the Fourth Amendment, as well as of the Federal and state wiretap statutes.

been prejudiced at his Federal trial, Ostrer did not satisfy the District Court's extremely high burden of factually demonstrating specific and documentable prejudice. Moreover, although it is undisputed that the Federal prosecutor received information that he never would have received but for the unconstitutional intrusion into Ostrer's lawyer-client communications, there is no evidence -- the trial court concluded -- of bad faith on the part of Government officials. The District Court held that, without a showing of bad faith on the part of the Federal Government, the Defendant must make an evidentiary showing of specific prejudice.

A panel of the Court of Appeals -- consisting of Judges Mulligan, Lumbard and Van Graafeiland, affirmed in a one-paragraph opinion, and, without any request by the Government, ordered the mandate to issue forthwith. Statements made from the Bench during oral argument on October 26, 1976, suggest that at least one judge of the panel did not regard legal strategy discussions to be protected by the Sixth Amendment, since legal strategy, Judge Van Graffeiland suggested, is often designed to hide the truth rather than to reveal it.* This, of course, is not the law of this Circuit, nor could it be. If the trial prosecutor learned from an illegal wiretap -- or for that matter from any wiretap, legal or illegal -- that the de-

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*None of the comments by the other judges on the panel suggested disagreement with this view.

fendant had decided upon a legal strategy not to take the witness stand, and if the prosecutor had designed his case around this information (which he may very well have done in this case), then surely the resulting conviction could not stand -- even if the explicit purpose of the defense strategy was to prevent the truth (or at least as much of it as the defendant could supply) from emerging. As the Supreme Court has long recognized, one of the very purposes behind the Bill of Rights -- especially the Sixth Amendment -- is precsiely to permit a criminal defendant to make strategic decisions with the aid of professional advice from trained counsel. See, e.g., Escobedo v. Illinois, 378 U.S. 478 (1964); Geders v. United States, __U.S.__, 96 S.Ct. 1330 (1976).

It has been Appellant's contention on this appeal that the trial court -- by its all or nothing approach to the issues of bad faith and prejudice -- misapplied the governing law. If the trial court's and the panel's decision is affirmed in the face of this record, it will be the first time -- to Appellant's knowledge -- that any Court of Appeals will have sustained a conviction where (a) it is conceded that governmental agents unlawfully overheard confidential legal strategy discussions between a Federal criminal defendant and one of his lawyers relating to his pending criminal case; (b) it is conceded that some of the overheard information was communicated to the Federal prosecutor trying the case; and (c) there was ample opportunity for the defendant to have been prejudiced by this conceded overhearing and communication.

Moreover, even if this Court were to sustain the decision of the trial court, which was affirmed by this panel, requiring that a showing of specific actual prejudice must be proven in this context -- thus becoming the first Circuit so to hold -- the record of case, bolstered to a large extent by governmental fact concessions and by findings of the trial court, plainly establishes that Appellant was specifically prejudiced in several discernible ways by the overhearing and communication of his defense strategy. (See discussion at pp. 30-42 of Appellant's brief.) Finally, even if this Court holds that Appellant has not been able to make a sufficiently specific showing of actual prejudice, the record establishes that he has been prevented from doing so by the inexcusable disappearance of two critical documents that had been in the possession of Government officials, and that were lost as a direct result of the Assistant United States Attorney's deliberate failure to notify the Defendant or the Court when he admittedly learned that he had earlier received information unlawfully overheard by an electronic surveillance of lawyer-client strategy discussions. (See discussion at pp. 42-47 of Appellant's brief; See United States v. Huss, 482 F.2d 38 (2d Cir. 1973).

It is not really open to dispute that the Fine-McGuire meeting of November 21, 1972, was a critical point in the case, since it constituted a major "chink in the wall." John

Fine admitted that he had made a memorandum detailing what transpired at the meeting, yet, he explained, in response to Ostrer's demand for its production, that it disappeared from the case file, where Fine would have deposited it before leaving the District Attorney's office (App. 299-303).

The disappearance of this potentially critical memorandum is curious, especially in view of the fact that the state court proceedings against Ostrer continued until April 3, 1975 (when the District Attorney moved to dismiss the indictment). At that time, it was clear that Ostrer's motion for a new trial in the Belmont case was being pressed vigorously, and in fact a formal motion for the production of all tapes, logs, memoranda and other documents relating to the monitored conversations had been filed in January 1975 (App. 18, 33). In fact, on April 7, 1975, Ostrer's counsel wrote to the United States Attorney expressing keen interest in materials from the District Attorney's office and demanding that the United States Attorney take immediate steps to preserve some of these materials. (See letter of Harvey A. Silverglate, Addendum III to Appellant's Brief on Appeal.)

Under the circumstances, the Government should be taxed with a strong inference that the missing memorandum contains information favorable to the defendant -- i.e., further indication that more extensive information concerning Ostrer's Federal trial was relayed from Fine to McGuire.

Nor can Fine's loss of his memorandum be attributed solely to the fault of state authorities. Fine attributed his failure to find his notes, at least in part, to the fact that, shortly before the evidentiary hearing in this case, the files of the District Attorney were relocated, and things got misplaced in the move (App. 301-303). If that is true, it means that had Ostrer earlier known of the communications by Fine to McGuire of privileged information, he would have sooner filed his motion for a new trial and for an evidentiary hearing. He would thus have sought and, presumably, obtained Fine's notes prior to the move. A major reason why Ostrer did not move faster was because McGuire, who now admits to having learned of the wiretap at his April 18, 1973, meeting with Fine, did not on his own communicate to Ostrer's counsel or to the District Court that he had just learned that he had, prior to the Belmont trial, been given information by a man who had listened in on bugged attorney-client conversations. McGuire's deliberate suppression of this information for nearly two years was inexcusable. See A.B.A., the Prosectuion Function and the Defense Function.

For example, as the Court below found, there was a lot of bugged conversation concerning the question whether or not Ostrer should take the stand, and concerning what advice his attorneys were giving him on that critical question (App. 680). The Court below found no specific evidence, however, to justify the Defendant's suspicion that Fine might have managed to trans-

mit to McGuire some inkling that Ostrer had decided -- as the wiretap tapes show -- not to take the witness stand. There are, of course, many ways and many levels on which such a crucial piece of information could have been communicated by Fine without McGuire's even having recognized that he was being given the fruits of Sixth Amendment incursions. More specifically, McGuire asked Fine for background information on Ostrer for help in cross-examination in the event Ostrer took the stand. It would have been a simple matter for Fine to have subtly indicated to McGuire that he (McGuire) would be better off spending less time preparing to cross-examine Ostrer. This might, in fact, partly explain why Fine, as found by the Court below, gave McGuire so little assistance in this area (App. 696). The Court below further found that at the McGuire-Fine meeting, "Fine encouraged McGuire not to do anything differently in the preparation of his case" (App. 695). Certainly it is impossible, on the basis of Fine's mere recollections, without his missing contemporaneous notes, to figure out precisely what Fine thought McGuire would do as a result of that advice. It is, further, impossible to determine whether or not Fine decided that McGuire was following the "correct" course in his Belmont trial preparation as a result of knowledge about the case and about Ostrer gleaned from hours of listening to privileged and other private conversations.

This is a complex, serious and important case, which was fully and professionally briefed by both sides (Appellant's briefs are attached as an appendix to this petition). The District Court and the Government have -- throughout this litigation -- regarded it and treated it as a close case whose outcome was by no means certain. After an evidentiary hearing and extensive briefing the District Court found that:

> "While the facts adduced in evidence do not rise to a level which would justify granting any substantive relief on this motion, nevertheless Ostrer's claims are colorable, and the issues tendered arise in a sensitive area affecting the fundamental constitutional rights of persons charged with crimes. He is entitled to litigate these issues on the merits prior to his incarceration."

The panel of this Court that was drawn to hear the case, while it could not and did not state that this was a frivolous appeal, has treated it as it would treat a frivolous appeal. It has done so despite the fact that its decision is directly in conflict with two Supreme Court decisions (Black v. United States 385 U.S. 26 (1966); O'Brien v. United States, 386 U.S. 345 (1967), and with decisions in the Third, Fourth, Fifth and D.C. Circuits. (See discussion at pp 17, 24-27 of Appellant's brief herein.) It is also a case of first impression in this Circuit; we have found no case -- nor has the Government cited any -- where the thrust of the unlawfully intercepted lawyer-client legal discussions has been found to have been transmitted to the actual Assistant United States Attorney who prosecuted the defendant. Surely this is an issue that deserves

more than the kind of summary disposition made by the panel. A reasoned opinion indicating whether this Court is in disagreement with the cases decided by the Supreme Court and the other Circuits or whether it regards those cases as distinguishable, would seem essential to orderly appellate procedures. Petitioner intends to seek a petition for a writ of certiorari in the event that he is denied relief in this Court. His main argument in that petition will be the direct conflict that appears to exist between this decision and those rendered by the 3rd, 4th, 5th, and D.C. Circuits (as well as by the Supreme Court in Black and O'Brien). It surely would be of considerable importance to the Supreme Court to know whether this Court deems itself in conflict with those circuits, or whether it regards those cases as distinguishable. In any event, the issue is sufficiently important so that Petitioner is entitled to a full appeal -- as distinguished from a summary disposition in the nature of a denial of certiorari by this Court.

It may well be that the docket of this Court has become so overcrowded that some truly frivolous appeals must be disposed of summarily or even -- perhaps -- without argument (as some circuits have done). But it is essential that the entire Court oversee the action of individual panels to assure that meritorious and serious appeals -- which this one surely is -- are not treated as if they were frivolous. The issues raised

by Appellant are entitled to the kind of probing consideration that can only come in the process of writing a principled opinion responsive to Appellant's serious claims. Accordingly, the petition for rehearing en banc should be granted and the case set down for argument before the entire Court.

Respectfully submitted,

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Dated: November 11, 1976

A D D E N D U M

Excerpt from opinion of Brieant, D.J., relating to release on bail pending final appellate review of the District Court's denial of the Defendant's Motion for a New Trial in the case of

United States of America

-v-

Louis Ostrer

No. 71 Cr.558-CLB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA, :

71 Cr. 558-CLB

-v- :

FINDINGS OF FACT
AND CONCLUSIONS OF LAW
FOLLOWING HEARING ON MOTION
PURSUANT TO RULE 33, F.R.CRIM.P.

LOUIS OSTRER, :

Defendant. :

- -X

Brieant, J.

On January 26, 1973, after a three-week jury trial before Chief Judge Edelstein of this Court, defendant Ostrer was found guilty on eleven counts which charged him with violation of various provisions of the federal securities laws, mail fraud and conspiracy so to do.[1/] The trial court acquitted Ostrer of twenty-three counts upon motion, and the jury acquitted him on the six remaining counts in this forty count indictment. The conviction was affirmed on appeal sub nom. United States v. Dioguardi, 492 F.2d 70 (2d Cir.), cert. denied, 419 U.S. 829 (1974).

Following the conclusion of his trial on these charges, Ostrer was arrested and indicted on unrelated state charges. In 1975, Ostrer's state indictment was dismissed when it became evident

between Ostrer and Evins, Flatow and Moss prior to trial. Moss and the written agreement were available to the defense.

It can hardly be said that Moss' testimony would have produced a different verdict. As previously noted, Moss' testimony regarding the agreement, rather than refuting Hellerman's testimony, was consistent therewith, and also consistent with the Government's theory of the case.

Bail Pending Further Proceedings.

Initially, the Court believed that defendant was and continues to be enlarged on bail pending determination by the District Court of this motion for a new trial, pursuant to an order of the Court of Appeals dated December 17, 1974. The aforementioned Court of Appeals order continues bail for "24 hours after a decision by the United States District Court on the motion for new trial, or until the next panel of this Court is available to hear any subsequent bail application, whichever is the later of those two dates."

This portion of the December 17th order is somewhat puzzling. Mr. Dershowitz, defendant's counsel on this hearing

stated (Tr. p. 514), "I take it is still open under the Court of Appeals ruling, whether to grant or deny bail in the event that the motion is turned down...."

Apparently, the Government disagrees, and presumably bases its disagreement upon reasoning based upon the rule found in footnote 11 of United States v. Ellenbogen, 390 F.2d 537, 541 (2d Cir.), cert. denied 393 U.S. 918 (1968). See United States v. Rosa, 372 F.Supp. 1341 (S.D.N.Y. 1974) for detailed discussion of the Ellenbogen rule, which this Court believes would be abrogated by our Court of Appeals upon a re-examination. Alternatively, the Government may regard the order of December 17th as "law of the case," and reads into it an implied negative, to the effect that the trial court could not continue the bail beyond the 24 hour period, or the availability of the next panel, whichever is later.

I conclude that the District Court has jurisdiction to enlarge Ostrer's bail pending appeal from this order, and also has jurisdiction to deny bail subject only to the fact that such denial would be stayed for the 24 hour period.

Addressing the merits of Ostrer's desire for bail, it seems appropriate that he should continue to be enlarged pending appellate finality.

First, in connection with this non-violent crime, Ostrer has at all times honored the terms and conditions of his bail, and has made himself available whenever required, during a period of almost five years since this indictment was filed. His attendance at court before me at required conferences prior to the hearings, and also during the hearings, was prompt, regular and orderly.

While the facts adduced in evidence do not rise to a level which would justify granting any substantive relief on this motion, nevertheless Ostrer's claims are colorable, and the issues tendered arise in a sensitive area affecting the fundamental constitutional rights of persons charged with crimes. He is entitled to litigate these issues on the merits prior to his incarceration.

If the foregoing factors alone are deemed insufficient to warrant enlarging defendant on bail pending appellate finality, we add a general observation applicable to all convicted criminals except those whose liberty directly threatens the public peace, or who show propensity for flight. Ostrer is a mature person, whose sentence has the primary purposes of general deterrence, and specific deterrence. To the extent that our federal prison system can do anything for a convict, and we think it can, the benefits of

incarceration depend upon the prisoner adjusting himself to the highly structured society of the institution, and participating fully and willingly in the educational programs and the prison industries. Before the average man will do this, all hope must be removed, except the hope of earning good time or early parole.

A prisoner who has his mind on his pending writs devotes all of his energy and thought to pending collateral attacks upon his conviction, and gains no benefit from any of the programs in the prison. Such a man is a disruptive factor for those who do not have pending writs, and has no incentive to throw himself into the many voluntary programs and make the best use of his time. Generally, we would be well advised to restructure our judicial system so as to gain early finality of judgments, and whenever possible defer imprisonment until such finality has been reached.

For all of the foregoing reasons and because we cannot say that this motion was in any sense frivolous, or dilatory, defendant is continued on his existing bail pending appellate finality, unless the Court of Appeals shall direct otherwise, or shall interpret its December 17, 1974 order so as to represent a clear withdrawal from this District Court of the power to enlarge

defendant upon such bail. We do not so read that order.

So Ordered.

Dated: New York, New York
June 4, 1976

CHARLES L. BRIEANT
U. S. D. J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- LOUIS OSTRER, Defendant, Appellant.	No. 76-1282

AFFIDAVIT OF SERVICE

BENJAMIN OSTRER, having been first duly sworn according to law, hereby deposes and says:

I have on this day served two copies each of the Appellant's "Motion Suggesting Hearing In Banc" and "Petition for Rehearing In Banc" upon the United States by delivering them to Lawrence B. Pedowitz, Esquire, Assistant United States Attorney, One St. Andrew's Plaza, New York, New York. Done this 11th day of November, 1976, at New York City.

Benjamin Ostrer

Signed and sworn to before me
on this 11th day of November, 1976.

Notary Public of New York

JULIUS NOVEMSER
Notary Public, State of New York
No. [illegible]
Qualified in New York County
Commission Expires March 30, 1977